DePaul Law Review

Volume 22
Issue 4 *Summer 1973*

Article 9

Constitutional Law - The Political Question Doctrine - O'Brien v. Brown and Keane v. National Democratic Party

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CONSTITUTIONAL LAW—THE POLITICAL QUESTION DOCTRINE—*O'BRIEN v. BROWN* AND *KEANE v. NATIONAL DEMOCRATIC PARTY*

On July 7, 1972, three days before the Democratic National Convention was to begin, Chief Justice Burger faced applications by petitioners Lawrence O'Brien and Thomas Keane to stay the judgments of the United States Court of Appeals (District of Columbia) pending a ruling by the Court upon their petition for certiorari.[1]

Following the spring presidential primaries, the Credentials Committee of the 1972 National Democratic Convention recommended that the Convention: (1) Unseat 151 of the 271 delegates from California committed to Senator George McGovern under the state's "winner-take-all" primary system which they determined violated the mandate of the 1968 Convention calling for reform in the party delegate selection process; and (2) unseat 59 uncommitted delegates from Illinois based upon the theory that they had been elected in violation of the "slate-making" guidelines adopted by the Democratic Party in 1971.[2]

In the first instance, dismissal of a complaint challenging the Credentials Committee's ruling resulted in a review by the court of appeals[3] which in turn concluded that the action of the committee violated the United States Constitution. In the second instance, a slightly different result obtained and after dismissal of the challenging complaint, the court of appeals decided that the constitutional rights of the unseated delegates had not been violated by the ruling of the Credentials Committee.[4]

The opposing factions, struggling for control of the Democratic National Convention, looked to the United States Supreme Court to determine which candidate would be the party's standard-bearer. The Supreme Court decided to stay the judgments of the court of appeals until

1. Brown v. O'Brien, 469 F.2d 563 (D.C. Cir.), *stay granted*, 409 U.S. 1 (1972).

2. The main basis for the challenge to the Illinois delegation was alleged violations of Guideline C-6 of the Report of the Commission of Party Structure and Delegate Selection to the Democratic National Committee as it was incorporated into Article III, Part I, of the Call of the 1972 Democratic National Convention.

3. 469 F.2d 563 (D.C. Cir. 1972).

4. *Id.*

it could rule on the petitions for certiorari in October. *O'Brien v. Brown*, 409 U.S. 1 (1972).

Traditionally, courts have been counseled against advancing into the political arena as characterized by Justice Felix Frankfurter's famous admonition: "Courts ought not to enter this political thicket."[5] It is often stated that in order to maintain their integrity, courts must remain aloof from the complicated, yet ever beckoning political arena. Political cases involve the legal system in controversies that dilute its efficacy and threaten to undercut the present political system. However, it is the duty of the judicial branch to arbitrate disputes involving the constitutional rights of individuals. It is for this reason that *O'Brien* presents a useful tool for examining the pattern created by courts in their attempts to achieve justice while maintaining a posture of political noninvolvement.

The delicacy of the issue becomes all too clear when one considers the constitutionally protected right to vote,[6] as translated from precinct caucuses into state primaries, national political conventions and finally into presidential candidates. Does a representative government elected by its citizens refer only to the national ballot or does it include the right of the individual to be represented as nearly as possible at all stages leading to a narrowing of the electorate's options to a few individuals?

Following a brief explanation of the political question issue, this casenote will explore the component parts of the political question doctrine. In addition, consideration will be given to the extent to which constitutional standards apply to the electoral process, the relationship of the judicial system to national political parties, and the position of public interest with respect to judicial intervention.

Unlike other litigants who look to the judicial system to intercede and settle a dispute non-violently, the parties whose controversy affects political rights must wait upon the court's determination of an added "threshold" question. Although the case may fulfill all of the traditional requirements, the parties may be barred from presenting their viewpoint simply because a court characterizes the question as political and refuses to hear the case.

Not all cases exhibiting political elements are deemed political questions. No frozen test exists and the problem is usually resolved on an

5. Colgrove v. Green, 328 U.S. 549, 556 (1946) (complaint to restrain state officers from acting pursuant to provisions of a state election law alleged to be invalid due to population changes).

6. U.S. CONST. art. I, §§ 2-4; art. II, § 1; art. IV, §§ 2, 4; art. V; amends. XII, XV, XVII, XIX, XXIII, XXIV.

ad hoc basis. Nevertheless, whether the court is asked to define the constitutional right to elect one's President with respect to delegate selection and national political conventions as in *O'Brien,* or to resolve some other political question, the same nerve is touched.

The responsibility of a court at this point is to make a preliminary determination as to whether the question is political in nature and if so, whether the disease has infected the whole to such an extent as to militate against court exposure. Therefore, a court will probably pose a series of its own questions to aid in the decision. Normally these might include the following: (1) Has a resolution of the issue been committed to another branch of government so that a judicial determination would impinge upon the separation of powers doctrine? (2) If not, is the question capable of judicial resolution; do judicially manageable standards exist or can they be formulated? (3) If so, from where does the plaintiff derive the right claimed and is the instant defendant prohibited from infringing upon it? (4) Does the case involve state action? (5) If the defendant's activities can be characterized as state action, at what stage was the right claimed violated and to what degree? (6) Who are the plaintiffs; are there additional interests at stake that courts are charged with protecting? A court then weighs these factors in the balance which tilts either in favor of or against judicial resolution of the controversy. A review of how courts have reacted in the past when faced with this problem will help in examining some of the pieces which together constitute the political question doctrine. In 1849, the United States Supreme Court was first asked to intercede in a political dispute in *Luther v. Borden.*[7] Two groups were competing for recognition, each claiming to be the lawful government of Rhode Island. In declining to consider the controversy, the Court based its decision upon the premise that any determination as to the lawfulness of a state government, is the responsibility of the other branches of government. The Court also felt that the prior action by the executive branch, which recognized the lawful authority of the charter government, should be final. The opinion included discussion of the absence of criteria enabling the Court to determine which form of government was republican, and as a result, courts have since refused to hear cases challenging state action based upon the guaranty clause.[8]

7. 48 U.S. (7 How.) 1 (1849).

8. United States v. Classic, 313 U.S. 299 (1941) (if primary election is an integral part of the process of electing Congressmen, Congress has power to regulate conduct of election officials in counting ballots); Highland Farms Dairy Inc. v. Agnew, 300 U.S. 608 (1937) (delegation to agency of power to control milk prices violates republican form of government, non-justiciable); Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74 (1930) (rule requiring invalidation of statute

The Court declared it could not act in the absence of judicially manageable standards.

By 1921, the United States Supreme Court spoke in regard to elections. The Court differentiated between elections which were provided for in the United States Constitution and primary elections; the latter deemed as not entitling voters to the same protections as the former.[9] The pattern changed slightly when six years later the Court granted a remedy for a politically caused private injury.[10] Less than a decade passed before the Court again considered the issue of primary elections. The controversy in *Grovey v. Townsend* led the Court to conclude that when a political party conducted a primary upon its own authority, that is, not under state regulation, then the primary need not meet constitutional standards with respect to the eligibility of voters.[11]

Political questions which included racial overtones presented little difficulty for the United States Supreme Court, and it decreed that a state convention excluding black citizens from the electoral process constituted state action, thereby violating the fifteenth amendment.[12] Armed with the mandate of the fifteenth amendment, the Court continued to address itself to the task of determining the political rights of black citizens.[13]

Although the Court refused to consider the reapportionment question in 1946,[14] by 1962, a more willing Court allowed itself to be lured into the "political thicket" which Justice Frankfurter had warned against. The plaintiffs in *Baker v. Carr* alleged that their votes were debased due to

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by all but one judge of state court negates republican form of government, nonjusticiable).

9. Newberry v. United States, 256 U.S. 232 (1921).

10. Nixon v. Herndon, 273 U.S. 536 (1927). The Court had addressed itself to similar questions in Giles v. Harris, 189 U.S. 475 (1903) and Wiley v. Sinkler, 179 U.S. 58 (1900). *But cf.* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971); Griffin v. Breckenridge, 403 U.S. 88 (1971).

11. 295 U.S. 45 (1935). *Compare Grovey with* Nixon v. Condon, 286 U.S. 73 (1932) (conduct of the Executive Committee of the Democratic Party, acting pursuant to a Texas statute that excluded black citizens from voting in primaries, constituted state action contrary to fifteenth amendment).

12. Smith v. Allwright, 321 U.S. 649 (1944).

13. Gomillion v. Lightfoot, 364 U.S. 339 (1960) (Alabama statute altering shape of Tuskegee to 28 sided figure so as to exclude black citizens from voting declared unconstitutional); Terry v. Adams, 345 U.S. 461 (1953) (pre-primary that excluded black citizens declared unconstitutional regardless of fact that such was accomplished); Wesberry v. Sanders, 376 U.S. 1 (1964) (one man's vote in a Congressional election should equal that of any other, as nearly as possible); Gray v. Sanders, 372 U.S. 368 (1963) (county unit system in Georgia violated equal protection clause of the fourteenth amendment, because vote counted for less as population increased).

14. Colegrove v. Green, 328 U.S. 549 (1946).

the fact that the Tennessee legislature had not reapportioned itself for sixty years.[15] The Court focused upon the aspect of justiciability and defined the concept as whether the duty asserted could be judicially identified and its breach judicially determined, and whether protection for the right asserted could be judicially fashioned. The political question doctrine was discussed at some length in the majority opinion and Justice Brennan offered the following remarks upon the subject:

> [I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.' . . . The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.[16]

As a result of judicial precedent, courts require that in order to be adjudicated, a case involving a political question exhibit not only the elements of a judicially manageable standard but also state action. State action is required to bring either the equal protection clause of the fourteenth amendment, or the fifteenth amendment into play, thus taking the case out of the realm of a purely political question. The years that followed *Baker v. Carr*[17] witnessed increased judicial intervention in areas that previously were regarded as strictly political.[18]

Although *O'Brien* constitutes the first case in which the United States Supreme Court considered whether or not constitutional protections apply to delegate selection to a national political convention,[19] lower federal

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15. 369 U.S. 186 (1962).

16. *Id.* at 210-11.

17. 369 U.S. 186 (1962).

18. Powell v. McCormack, 395 U.S. 486 (1969) (exclusion of Congressman subject to judicial review); Moore v. Ogilvie, 394 U.S. 814 (1969) (Illinois statute requiring 200 signatures from each of fifty counties before candidates representing a third political party would be placed on ballot declared unconstitutional); Williams v. Rhodes, 393 U.S. 23 (1968) (Ohio statute regulating access of new political parties to ballot declared unconstitutional); Avery v. Midland County, 390 U.S. 474 (1968) (United States Constitution permits no substantial deviation from equal population in drawing districts for units of local government); Reynolds v. Sims, 377 U.S. 533 (1964) (action by lower court ordering a reapportionment of both houses of the Alabama legislature affirmed); Pac. Tel. Co. v. Oregon, 223 U.S. 118 (1912) (initiative and referendum negates republican form of government, non-justiciable). *See* Baker v. Carr, 369 U.S. 186 (1962) (Frankfurter, J., dissenting).

19. The Court refused to consider the problem in Delaware v. New York,

courts have been asked to expound upon the one-man-one-vote principle enunciated in *Wesbery v. Sanders* in 1964.[20] These cases provide a basis for summarizing the present state of the application of the one-man-one-vote principle to the delegate selection process.

The court of appeals declared in *Irish v. Democratic Farmer-Labor Party*[21] its intention not to extend the *Wesbery* ruling[22] for the purpose of alleviating alleged malapportionment in state delegations to the Democratic National Convention where such malapportionment resulted from the action of properly elected precinct delegates to the county convention. The court refused to interfere at any level above precinct activity.

Shortly before *Irish,* in *Lynch v. Torquato,*[23] the Court of Appeals for the Third Circuit decided that the one-man-one-vote principle had no application to the precinct unit election of county chairmen for national political parties. Registered voters of the Democratic Party had brought suit against the county committee alleging that the election of the chairman should result from the popular vote of all registered Democrats. The court maintained that the system of electing the county chairman to the Democratic Party by precinct unit voting did not deprive party members of the equal protection of the laws, although several precincts in the city had widely disparate numbers of Democrats.

In 1970 and 1971, the lower federal courts still faced disputes involving national political conventions. The plaintiffs in *Maxey v. Washington State Democratic Committee*[24] alleged that the state commerce, under statutory authority, denied individuals in more populous areas of the state of Washington equal participation in the presidential nomination process.

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385 U.S. 895 (1966) and Stassen for Pres. Citizens Comm. v. Jordan, 377 U.S. 914 (1964).

20. 376 U.S. 1 (1964).

21. 399 F.2d 119 (8th Cir. 1968). *Cf.* Dahl v. Republican State Comm., 319 F. Supp. 682 (W.D. Wash. 1970) (election of state committeeman by city committees not deemed integral phase of state created election process: one-man-one-vote principle held not to apply). *See also* Smith v. State Executive Comm. of Democratic Party of Georgia, 288 F. Supp. 371 (N.D. Ga. 1968) (equal protection clause does not apply to nonlegislative functions such as the adoption of rules and regulations by a state committee of a political party).

22. 376 U.S. 1 (1964).

23. 343 F.2d 370 (3d Cir. 1965). The Court also emphasized the right of political parties to self organization, an approach utilized by state courts: Mendlesohn v. Walpin, 197 Misc. 993, 99 N.Y.S.2d 438 (Sup. Ct. 1950); Zuckman v. Donahue, 274 App. Div. 216, 80 N.Y.S. 698 (1948). *See generally* Note, *Developments in the Law: Judicial Control of Actions of Private Associations,* 76 HARV. L. REV. 983 (1963).

24. 319 F. Supp. 673 (W.D. Wash. 1970) (plaintiffs sought redress under 42 U.S.C. § 1983).

Unlike other decisions rendered in this area, the district court held that the one-man-one-vote principle applied to the manner of sending delegates to state and national conventions, and that the formulas, in part, violated voters' rights to equal protection of the laws. The majority opinion reasoned:

> The presidential nominating process can and should be one of the most readily available and most effective means of accomplishing significant political change in this country. Close constitutional scrutiny therefore is in order wherever state and party procedures offer the voter something less than the fullest possible participation. . . . I agree that the one-man-one-vote principle must be applied at the precinct level, but insofar as *Irish* and *Smith* hold that this is the only level to which it applies I think those cases are inconsistent with the principles announced in *Reynolds* and *Gray*. Each stage of the delegate-selecting process is part of an over-all unitary plan which ultimately results in the selection of national delegates and, shortly thereafter, Electoral College electors. Decisions made within the party apparatus to accord more weight to some counties than to others are not mere administrative decisions which can legitimately be taken out of the hands of the voters. Such decisions effectively deny voters the right to an equally weighted vote. If the teaching of the *Reynolds* and *Gray* cases can be subverted simply by imposing . . . a system which requires equal voting only at the lowest level, the one-man-one-vote principle would be illusory.[25]

Bode v. National Democratic Party[26] revealed a slightly different approach when the court declared that any decision made by the Democratic National Convention was tantamount to a decision of the states acting in concert and therefore, subject to constitutional standards applicable to state action.[27] The United States Supreme Court refused to hear the controversy.[28]

The United States Supreme Court again denied certiorari in the *Georgia v. National Democratic Party*.[29] The plaintiffs sought injunctive and declaratory relief from the two major political parties on the grounds that the national conventions were malapportioned. The court of appeals ruling focused on the fact that the constituency of each national party is significantly smaller than the whole of the eligible electorate; it varies widely from state to state and from election to election. This circumstance justified the political parties deviating from the one-man-one-vote rule in apportioning delegates.[30]

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25. *Id.* at 678 and 680.

26. 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972).

27. *See* Note, *Bode v. Nat'l. Democratic Party: Apportionment of Delegates to Nat'l. Political Conventions*, 85 HARV. L. REV. 1460 (1972).

28. Bode v. Nat'l. Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972).

29. 447 F.2d 1271 (D.C. 1971), *cert. denied*, 404 U.S. 858 (1971).

30. 447 F.2d at 1279. *See also* Mahan v. Howell, 93 S. Ct. 979 (1973).

Although the one-man-one-vote principle is a judicially manageable standard, it remains unclear whether delegation apportionment lends itself to this treatment, hence entitling it to the justiciable label. National political conventions are neither representative of the population at large nor are they as nearly representative as possible. Not a governing body by definition, the presidential nominating conventions represent individuals only in a loose, conceptual sense. As a result, the courts perceive the activities of these voluntary associations as outside their sphere of concern.

However, the requirement of state action, rendering the equal protection clause under the fourteenth amendment operative, may be fulfilled according to several different tests. First, if any state legislation governs a state's primary elections, then the selection of delegates to a national political convention constitutes state action. Second, if a state places the names of convention nominees on its election ballots, it may no longer claim noninvolvement with the presidential selection process. Third, since the electorate's choice is so limited by the national political conventions, the primary elections constitute state action, because they play such a vital role in the nominating process.[31]

The jurisdictional issue lies at the heart of the political question doctrine, because it merges into the separation of powers analysis necessary to any determination of whether or not the courts should become involved in politically sensitive areas. If, as outlined in *Baker v. Carr*,[32] the relationship between the judiciary and the co-ordinate branches of the federal government fuses the axis upon which the political question doctrine turns, it becomes difficult for the United States Supreme Court to refrain from making judicial determinations—the delegate selection and presidential nomination process are neither controlled, legislated, nor counseled by either the executive or congressional branches of the federal

31. For further discussion of the state action requirement, *see* Note, *Constitutional Law—Delegate Allocation Bode v. Nat'l Democratic Party*, 60 GEO. L.J. 1331 (1972); Goldstein, *One-Man, One-Vote and the Political Convention, Alternate Methods of Implementation: A Political Analysis; The Case Law and the Constitution: A Legal Analysis*, 40 U. CIN. L. REV. 1 (1971); Note, *Freedom of Association and Selection of Delegates to the Nat'l. Political Conventions*, 56 CORNELL L. REV. 148 (1970); Bellamy, *Applicability of the Fourteenth Amendment to Allocation of Delegates to the Democratic National Convention*, 38 GEO. WASH. L. REV. 892 (1970); Comment, *One Man, One Vote and the Selection of Delegates to the Nat'l. Convention*, 37 U. CHI. L. REV. 536 (1970); Note, *Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions*, 78 YALE L.J. 1228 (1969); Note, *Presidential Nomination—Equal Protection at the Grass Roots*, 42 S. CAL. L. REV. 169 (1968).

32. 369 U.S. 186 (1962).

government in their official capacity. Plaintiffs in delegate selection controversies request that the courts adjudicate disputes arising from the constitutionally protected right to vote and the fourteenth amendment.

The parties in *O'Brien v. Brown*[33] requested the Court, as the sole interpreter of the United States Constitution,[34] to translate the meaning of the right to vote into the present political structure. The Justices could not refuse on the ground that this responsibility is committed to another branch of the government, for it is the obligation of the United States Supreme Court to decide this issue. However, the Court reasoned in *O'Brien*: "these cases involve the claims of the power of the federal judiciary to review actions thought to lie in the control of political parties."[35] Therefore, it is a tacit understanding, anchored in a particular ideology, and not a constitution, a statute, or legal precedent, that causes the Court to retreat into the comforting arms of the political question doctrine and to seek a shelter that *Baker v. Carr*[36] never built. On the contrary, the Court has openly committed itself to the right of every American citizen to vote and to have that vote meaningfully counted.

Recently, the United States Supreme Court reaffirmed its position that "the right to vote in an election is protected by the United States Constitution against dilution or debasement."[37] Nevertheless, the Burger Court failed to articulate the concrete reasons supporting its apparently contradictory posture in *O'Brien*. Lack of a judicial mandate in this area need not prevent the Court from considering the question of the federally protected right to vote and its relation to the present political structure. As was noted in *Harper v. Va. Bd. of Elections*,[38] conceptions of what constitutes equal treatment for purposes of the equal protection clause do not remain static.

Other less reluctant judicial officers explained their fears in this manner:

> Disregard of inherent limits in the effective exercise of the Court's 'judicial power' not only presages the futility of judicial intervention in the esssentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of 'the Supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce.[39]

33. 409 U.S. 1 (1972).
34. U.S. CONST. art. III, § 2, cl. 1.
35. 409 U.S. at 4.
36. 369 U.S. 186, 210, 211 (1962).
37. Hadley v. Junior College District, 397 U.S. 50, 54 (1970).
38. 383 U.S. 663, 669 (1966).
39. Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

Even if the courts were to take such a risk, what is the probability of success? Any remedy necessitates not only close supervision by the courts, but also "the realization that, in any event, any remedy we might attempt to fashion might well not effectuate numerical equality anyway."[40]

Therefore, the explanation for noninvolvement seemingly stems from the fact that the Court's integrity is at stake; the image it has so painstakingly created is a fragile one, resting on civil obedience and voluntary co-operation on the part of the executive and congressional branches of the federal government. The risk of intervention is great; it may well bring accusations of unwarranted judicial interference, and it may create the impossible task of insuring that the citizen's power at the primary level is co-extensive with his right to vote.

Another issue presented is whether the public interest is served by judicial restraint in a controversy involving the extent of fair representation afforded a citizen in a democracy. In *O'Brien*, the United States Supreme Court answered the question in the affirmative, leaving the determination of the question to those in control of the two major political parties.[41] Therefore, as a result of what the Court did *not* say in *O'Brien*, the meaning of the constitutionally protected right to elect one's President remains unclear. The Court correctly pointed out that the Democratic National Convention constituted an available forum in which to review the recommendations of the Credentials Committee.[42] However, in light of the nature of its considerations, the Court might have considered whether the convention hall constituted the *proper* forum for interpreting the United States Constitution. The petitioners in *O'Brien* claim that the Credentials Committee impaired the right of Democratic voters to have their votes counted in a presidential primary election. Only the Supreme Court can determine whether such a right exists and if so, under what circumstances it is violated.

On October 11, 1972, the United States Supreme Court granted certiorari in *O'Brien v. Brown*.[43] The opportunity to address itself to the

40. Irish v. Democratic Farmer-Labor Party of Minnesota, 399 F.2d 119, 120 (8th Cir. 1968).

41. It appears that the success of any group appearing before the Credentials Committee depends upon the support of one active candidate and the passive acquiescence of another. In addition, the Committee is comprsied of more than 100 members chosen by the state delegations. "[M]eeting on the eve of the Convention [it] is inevitably subject to strong partisan influence and control." *Credentials Contests at 1968 and 1972 Democratic Nat'l. Convention*, 82 HARV. L. REV. 1438, 1467 (1969).

42. 409 U.S. at 5.

43. 93 S. Ct. 67 (1972).

real issue was presented in a context bereft of the political intensity preceding the Democratic National Convention. Justice Marshall had prophesied that unless dealt with in a forthright manner the issue would only return to haunt the Court. "The dispute in these cases concerns the right to *participate* in the machinery to elect the President of the United States. If participation is denied, there is no possible way for the underlying disputes to become moot."[44] However, public attention had greatly diminished and the words of the dissenting Justice had a negligible effect. In the fall of that year, the Court vacated its July judgment, remanding the entire problem to a lower court for its determination on the issue of mootness.[45]

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44. 409 U.S. at 10 (Marshall, J., dissenting).

45. On Feb. 16, 1973, the United States Court of Appeals for the District of Columbia declared the matter moot, No. 72-1629-1631, Feb. 16, 1973. With respect to post convention representation, Guideline C-6 was declared constitutional.